THE INTERESTS OF POSTERITY IN THE CONSTITUTIONAL SCHEME

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I. INTRODUCTION

Historically, societies attracted to unproductive ways of enhancing or maintaining their usual levels of consumption have faced substantial resistance from their victims. Recently, however, we have begun to appreciate the advantages of despoiling our neighbors in time, rather than space. One of the most crucial advantages is the limited political resistance that tends to arise from young or future persons.

Once a society chooses, consciously or not, to take advantage of future generations, the democratic process of electoral competition tends to facilitate, rather than inhibit, such a choice. However, there is no reason in principle why the Constitution's equal protection clause cannot serve as a rallying point for resistance to the substantial injustice between generations. Obviously, it is only with trepidation that we should extend the coverage of the equal protection clause to protect nonexistent generations. This Article suggests, however, that sensitivity to both the benefits and the undoubted risks and costs dictates at least some limited extension of equal protection to future generations.

This Article explores the nature of our society's inclination, manifested increasingly throughout the past half century, to shift substantial costs and risks onto future generations. The Article draws upon cultural history, the idea of partnership and the lessons of partnership law, the history of deferral of gratification, the idea of a social discount rate, and philosophical analyses of rights, including the discussion of whether it makes sense to say that nonexistent people have rights in the present. The argument focuses upon generational cost-shifting in the law of marital dissolution, environmental law, and most crucially, in the federal government's statutory policy choices in areas such as social security funding, public savings rates, and public indebtedness incurred to finance current general consumption.

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The issue of an equal protection-based constitutional response to intergenerational exploitation or breach of faith is not one that is best explored with an eye toward mathematical rigor. The interests of generations often overlap. Conflicts of interests between generations need not be stark, uniform, and clear-cut. The analytical focus must occasionally shift from talk of different generations to talk of short-term and long-term consequences. What counts as a generation may vary slightly for different purposes. There are doubtless important differences between young children and generations not yet conceived. Granting all these complications, a reasonably clear societal problem remains. Ultimately, there is a crucial line of division between those who, at the relevant time, are able to promote their perceived interests effectively through the representative electoral process, and those who for reasons of timing cannot.

Despite practical complications, including issues of justiciability, the choice faced by current decisionmakers is increasingly plain. The choice is between accepting inter-generational equal protection litigation, or rationalizing a self-indulgent repudiation of a long-held and morally justified cultural understanding of progressive intergenerational sacrifice and responsibility. The idea of the equal protection of generations does not license voluminous litigation on behalf of unborn generations. Not every current decision adverse to the interests of future generations amounts to a constitutional violation, just as not every coercive governmental regulation of business rises to the level of a taking. As section III. B. illustrates, litigation of the equal protection rights of future generations is, for practical reasons, perhaps best confined to that focusing on overall effects, overall resources, and overall opportunity levels available to future generations, as measured, at least crudely, through federal budgetary and savings policy.

II. THE TRADITIONAL CULTURAL COMMITMENT TO POSTERITY

A. Partnership and the Future

Historically, American culture has embodied an element of obligation to future generations. This has been a matter not merely of aspiration, but of practice. The preamble to the Constitution itself refers to the aim of securing "the blessings of liberty to ourselves *and our posterity* . . . ."[1] At the level of ordinary family life, parents have sought a better life for their offspring than they enjoyed.[2] In

1. U.S. CONST. preamble (emphasis added).

2. Narveson, *Future People and Us*, in OBLIGATIONS TO FUTURE GENERATIONS 57 (1978) [hereinafter OBLIGATIONS].

part, this impulse to necessary sacrifice for the sake of succeeding generations may reflect a sense of gratitude for sacrifices by our predecessors for our benefit.[3]

The theme of morally binding linkages between generations, at the societal level, was classically articulated by Edmund Burke. Burke observed that

> [s]ubordinate contracts for objects of mere occasional interest may be dissolved at pleasure—but the state is to be looked on with other reverence; because it is not a partnership in things subservient only to the gross animal existence of a temporary and perishable nature. It is a partnership in all science; a partnership in all art; a partnership in every virtue, and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born. Each contract of each particular state is but a clause in the great primeval contract of eternal society. . . .[4]

Burke's formulation, which in turn reflects the understandings of his ancestors,[5] is today as often quoted for its presumed fallacies or excesses[6] as for its insights. Yet there are several themes running through Burke's observations that remain worthy of attention.

First, and least explicit in this particular passage from Burke, is the ultimately theocentric basis of Burke's conception of our binding obligation to future generations. The "great primeval contract of eternal society"[7] is meaningless apart from its divinely ordered context. As Peter Laslett has observed, "religious revelation made it possible for time to be held irrelevant and one man in one generation to stand in the place of another man in another generation. . . ."[8] At least a substantial number of the framers of the Constitution, so conceived the nature of the obligation to posterity.[9]

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3. Derr, *The Obligation to the Future*, in RESPONSIBILITIES TO FUTURE GENERATIONS: ENVIRONMENTAL ETHICS 40 (E. Partridge ed. 1981) [hereinafter RESPONSIBILITIES].

4. E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 110 (Dolphin ed. 1961).

5. *See, e.g.*, E. TILLYARD, THE ELIZABETHAN WORLD PICTURE 25-36 (Vintage ed.).

6. *See, e.g.*, Callahan, *What Obligations Do We Have to Future Generations*, in RESPONSIBILITIES, *supra* note 3, at 76-77 (no moral obligations follow, given our involuntary entry into partnership); Laslett, *The Conversation Between the Generations*, in PHILOSOPHY, POLITICS AND SOCIETY 40-41 (P. Laslett & J. Fishkin eds. 5th ed. 1979) (no cogent justification of rights and duties follows therefrom); Golding, *Obligations to Future Generations*, 56 *Monist* 85, 95-97 (1972) (expressing skepticism as to existence of obligations to future generations).

7. E. BURKE, *supra* note 4, at 110.

8. Laslett, *supra* note 6, at 56.

9. *See* Hartshorne, *The Ethics of Contributionism*, in RESPONSIBILITIES, *supra* note 3, at 105.

There is little doubt that religious motivations to promote the interests of future persons historically have been important.[10] The more interesting, and perhaps practically critical, question is whether any other sorts of motivations can ultimately suffice. The renowned ecological theorist Garrett Hardin has disconcertingly wondered whether purely secular rationality is, over the long term, up to the task of providing a stable, coherent, motivating justification of an obligation to promote the interests of future generations.[11] The equally renowned economist Robert Heilbroner has gone a step further by answering Hardin's question with a flat negative.[12] The case for the view that any adequate foundation for a genuinely binding moral obligation to, or on behalf of, posterity must be theocentric may well be strong.[13] We should in any event consider the possibility that attenuation of religious belief in a society may be correlated with a gradual attenuation of sacrificial concern for the interests of posterity.[14]

The traditional religious foundation for our cultural commitment to future generations denies any particular generation a privileged position, or a license to undermine and dissipate rather than enhance and transmit, the achievements of its predecessors. This notion is reflected in the second of Burke's themes, that of the perpetually unfinished but progressive character of the cultural enterprise. The obligation of each generation is to further, rather than impair, the long-term process of cultural development. From this there arises the duty to ensure not merely that future generations can exist and survive, but that they are endowed with the cumulated cultural inheritance necessary for them to advance the process of cultural development.[15]

The sense of the moral importance of unrealized cultural potential continues to drive certain contemporary theories of intergenerational obligation. Gregory Kavka, for example, reasons that

> the accomplishments of mankind in the intellectual, artistic, and scientific spheres, and the likelihood of continued pro-

10. Derr, *supra* note 3, at 41.

11. *See* Hardin, *Who Cares for Posterity?* in RESPONSIBILITIES, *supra* note 3, at 224.

12. *See* Heilbroner, *What Has Posterity Ever Done for Me?*, in RESPONSIBILITIES, *supra* note 3, at 191.

13. *See* Passmore, *Conservation*, in RESPONSIBILITIES, *supra* note 3, at 49; Thompson, *Are We Obligated to Future Others?*, in *id.* at 202; Hartshorne, *supra* note 9, at 106. For a discussion of some of the broader issues involved, see Wright, *Legal Obligation and the Natural Law*, 23 GA. L. REV. 997 (1989).

14. *Cf.* Laslett, *supra* note 6, at 56 (noting apparent inability of any essentially secular substitute for religious commitment to generate satisfactory logic of moral obligation to future generations, at least thusfar).

15. *See* Passmore, *supra* note 13, at 49-50 (discussing Kantian approach).

> gress in these fields, give us a substantial reason to wish the race to survive. For if the life of our species ends, so will these collective enterprises; while if it continues, spectacular accomplishments in such fields of endeavor are highly probable.[16]

It is important to appreciate, though, that the logic of progressive or perfectionist approaches to intergenerational justice carries them beyond the mere preservation of the species. Mere survival or stagnation is not the point. For spectacular accomplishments to be highly probable, each generation must exercise some care, and make some sacrifice, to ensure that the material, economic, and cultural prerequisites of such spectacular progress are bequeathed to each succeeding generation, in cumulative fashion. We shall explore more fully below in this section the implications of this view in interpreting the constitutional requirements imposed by the equal protection clause.

In the meantime, it is worth reflecting on the scope of what Professor Brian Barry has referred to as "cosmic impertinence."[17] As Professor Barry recognizes, impertinence lies not merely in deliberately or negligently bringing our collective life to a close, but in limiting the constructive, developmental potential of that collective life.[18] Suppose, for example, that medieval European society had stumbled upon some perhaps irreversible[19] technique which, if ever implemented, would ensure that the general level of cultural development and well-being would never sink below the level already attained by the medievals. Human society would persist indefinitely, with no risk of material, economic, or cultural regression. The price, though, would be the loss of the possibility of progress. The guaranteed cultural floor also would be its ceiling.[20]

If there were a way for us to somehow speak from the future, to advise the medieval contemplating whether to adopt the technique

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16. Kavka, *The Futurity Problem*, in OBLIGATIONS, *supra* note 2, at 196. *See also* English, *Justice Between Generations*, 31 PHIL. STUDIES 103-04 (1977) (commenting on John Rawls' theory of intergenerational justice).

17. Barry, *Justice Between Generations*, in LAW, MORALITY, AND SOCIETY 284 (P. Hacker & J. Raz eds. 1977).

18. *See id.*

19. For purposes of our argument, we actually need not assume that the decision to implement this technique would be irreversible, but the assumption adds starkness and poignancy to the example. The cost of reversing a prior generation's choice for cultural stagnation may go to the degree to which the later generation possesses a capacity for cultural self-determination, though.

20. This precludes the possibilities of general progress and deterioration, as measured by any means one cares to adopt, but does not preclude the idea of cultural change. Equality does not imply sameness. Under our assumptions, a later generation can gain in cultural value or achievement in some respect only to the extent that it somehow loses cultural value or achievement in some offsetting respect.

in question or not, there is little doubt of the substance of our advice. To bring cultural development to an end at such a stage would be an unthinkable act of impertinence, of visionless narcissism. The progressivist argument is that to do so would be wrong for the medievals, and wrong, if not equally wrong, for us today.

Admittedly, rejecting the offer of guaranteed cultural stagnation is in a sense not necessarily inconsistent with applying the Constitution's equal protection clause between generations. We can easily distinguish between non-progressive and progressive applications of the equal protection clause between generations. In a quite literal, if non-progressive sense, the medievals admittedly would be ensuring equal protection of the laws to themselves and all future generations by the choice of a floor and a ceiling to material, economic, and cultural achievement, where the ceiling was no higher than the floor. Persons who happen to be born in the seventeenth, or nineteenth century in a sense have no complaint against the medievals under the equal protection clause. They are, overall, just as well off materially, economically, and culturally as any other generation, including their predecessors. To be just as well off is to be equal.

Most of us resist this conclusion only because we have inherited a more dynamic, progressive sense of the appropriate relationships between generations. This sense translates into a progressive interpretation of the equal protection clause's application between generations. A progressive interpretation of equal protection, of which there may admittedly be varied formulations, would deny that the medievals, in placing a ceiling and a floor on cultural development, have really accorded equal protection of the laws to future generations. On this view, any generation that prevents, retards, or decelerates otherwise reasonably achievable overall cultural progress denies equal protection of the laws to any significantly affected future generation.

Equality, on this approach, consists not in handing on a static level of achievement, but in sacrificing or investing,[21] each genera-

21. These phrases obviously conceal a number of difficult policy choices. For example, it must be determined, on a progressive interpretation of equal protection, whether each generation is obligated for, say, equal per capita subjective absolute sacrifice, or whether each generation is instead bound to add, in absolute or percentage terms, the same increment to the growing cultural endowment. Each of these versions of progressive equal protection may lead in practice to different results. Suppose, for example, that one generation happened, without significant effort of their own, to stumble through an unusual series of events upon cheap, practical cold fusion power. Would their making that discovery available to posterity significantly reduce or partially discharge their overall obligation of equal protection to the future?

tion in turn, for the benefit of each succeeding generation, where those generations are equally bound to augment the cultural stock to be turned over to their successors. Each generation, on a progressive interpretation, benefits in turn from the cumulative sacrifices and investments of its predecessors, and is bound to sacrifice and invest similarly on behalf of its successors. While each generation tends to be better off than its predecessor, this difference is hardly invidious, and reflects the same set of principles of sacrifice, savings, and investment, whatever they happen to be, applied fairly to each generation in light of its material circumstances.

The progressive quality of the cultural enterprise, as envisioned by Burke, is inseparable from the third, and most fully explicit theme of Burke's remarks, that of the partnership nature of the intergenerational enterprise.[22] Society, on Burke's view, involves partnership or fiduciary duties across time. Similar ideas are expressed by means of the language of stewardship,[23] trusteeship,[24] and custodianship.[25]

While it would be foolish to deny that the concept of partnership is applied between generations in a somewhat metaphorical sense, the language and law of partnership is sufficiently relevant to be instructive. Consider the prosaic language of the Uniform Partnership Act, which provides that

> [e]very partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.[26]

Thankfully, the question of precisely which variant of progressive equal protection is most desirable need not be resolved for purposes of this Article. A society that wishes to accord equal protection to future generations will simply choose some reasonable formula. We would presumably want a principle, or combination of principles, that avoids overburdening early generations who may be close to the subsistence level, while not licensing indolence or self-indulgence on the part of later generations. As well, while a given output can presumably be produced or a given problem solved with less exertion by later and wealthier generations than by earlier generations, this should not license early generations promiscuously to shift the costs of their own activities into the future in such a way as to unreasonably impair cultural progress. These themes are elaborated in section V(c) below. For a general sense of the moral limits of calls to collective sacrifice on behalf of the future, see P. BERGER, PYRAMIDS OF SACRIFICE 151 (1976); Narveson, *supra* note 2, at 59.

22. *See supra* text accompanying note 4.

23. *See* Toulmin, *The Case for Cosmic Prudence*, 56 TENN. L. REV. 29, 31 (1988).

24. *See* Golding, *supra* note 6, at 87.

25. *See* Barry, *supra* note 17, at 284.

26. UNIF. PARTNERSHIP ACT § 21(1), 6 U.L.A. 258 (1969).

It is clearly established under the cases decided in accordance with this provision that all partners owe one another fiduciary duties[27] of utmost good faith, fairness, and loyalty.[28] When one partner takes on the role of "manager," as each generation in our context may be said to do in turn, those obligations of fair dealing are only heightened.[29] Unless the partners have expressly agreed to the contrary, a partner may not profit individually out of partnership business[30] or in a way injurious to the interests of the partnership.[31] Opportunities which properly belong to the partnership may not generally be used by individual partners for their own personal benefit.[32]

Of course, partnerships between generations are unique in that absent some sort of special institutional mechanism of representation, future generations cannot expressly consent to any action undertaken by a prior generation, though the future generation may somehow ratify that prior action after the fact. But the uniqueness of intergenerational partnerships does not show that they are not usefully thought of as partnerships, or that the partnership law developed in more pedestrian contexts is inapplicable. The single most salient lesson to be drawn from partnership law for our purposes is the necessity of avoiding what amounts to generational selfishness and self-dealing. No generation is entitled to burden the partnership, including its successor generations, for its own benefit or advantage. If this seems onerous to each successive current generation—the "managing partner"—it is a fiduciary responsibility borne equally, in turn, by each succeeding generation.

As we have seen above,[33] our American constitutional predecessor generations have taken the fiduciary burdens of intergenerational partnership with some seriousness. As we have also seen,[34] religious belief may have been one of the crucial sustaining motivation in this regard. Limitation on consumption, enhancement of savings, and the augmentation of productive capital are, as de-

27. *See, e.g.*, Day v. Avery, 548 F.2d 1018, 1026 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 908 (1977); Sherman v. Lloyd, 181 Cal. App. 3d 693, 698, 226 Cal. Rptr. 495, 498 (1986).

28. *See, e.g.*, Newburger, Loeb & Co. v. Gross, 563 F.2d 1057, 1078 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978).

29. *See, e.g.*, Crenshaw v. Swenson, 611 S.W.2d 886, 890 (Tex. Civ. App. 1980) ("It is axiomatic that a managing partner in a general partnership owes his co-partners the highest fiduciary duty recognized in the law.").

30. *See, e.g.*, Phillips v. Kula 200, Wick Realty, Inc., 2 Hawaii App. 206, 211, 629 P.2d 119, 123 (1981).

31. *See, e.g.*, Covalt v. High, 100 N.M. 700, 675 P.2d 999, 1001 (App. 1983).

32. *See, e.g.*, Elle v. Babbitt, 259 Or. 590, 600, 488 P.2d 440, 445 (1971).

33. *See supra* notes 1-9 & accompanying text.

34. *See supra* note 10 & accompanying text.

scribed by Max Weber, crucial to the Protestant Ethic.[35] As well, a society's willingness to sacrifice for its future may also reflect its knowledge of,[36] identification with,[37] and concern for,[38] its own past. We might also reasonably speculate that a society's characteristic overall time horizon, and the ability to defer gratification, collectively and as reflected by individual decisionmakers, may, along with other factors, affect the society's capacity to save, to invest productively, to generate economic surpluses, and the sheer subjective tolerability of sacrifice for the future.

There is at least some evidence to suggest that awareness of and concern for the future,[39] and the ability to defer gratification,[40] are among the factors positively associated with achievement and economic development. The ability and inclination to focus on the long term and to delay gratification may, as Benjamin Franklin,[41] Max Weber,[42] and contemporary psychologists[43] have supposed, make sustained investment and the sustained progress of the economic partnership possible.

The material and psychological demands of the progressive intergenerational partnership are, all else equal, therefore best borne by certain sorts of personalities. The subjective tolerability of the demand that the future be taken into proper account may in part depend upon such factors as family background.[44] As the following section illustrates, however, there is some reason to suspect that our

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35. *See* M. WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 53, 172 (1958).

36. *See* Hardin, *supra* note 11, at 228. If it could be shown that educated Americans today know less of their history than did their predecessors of one or two generations ago, this would suggest a possible reason for our current decreased devotion to the interests of our successors.

37. *See id.* at 229.

38. *See* Bennett, *On Maximizing Happiness*, in OBLIGATIONS, *supra* note 2, at 67 ("I would probably care less about the 21st century if I didn't love the 17th so much").

39. *See, e.g.*, D. MCCLELLAND, THE ACHIEVING SOCIETY 237-39, 325 (1961); Triandis, *Toward a Psychological Theory of Economic Growth*, 19 INT'L J. PSYCHOLOGY 79, 94 (1984).

40. *See, e.g.*, Triandis, *supra* note 39, at 94; Ray & Najman, *The Generalizability of Deferment of Gratification*, 126 J. SOC. PSYCHOLOGY 117, 117 (1985). *See also* Wright, *Judicial Responses to Long-Term Societal Decline*, 30 ARIZ. L. REV. 271, 277, 280 (1988) (discussing the role of short-term orientation in societal decline).

41. *See* M. WEBER, *supra* note 35, at 51-53.

42. *See id.* at 172.

43. *See supra* notes 39-40; *see also* Funder, Block, & Block, *Delay of Gratification: Some Longitudinal Personality Correlates*, 44 J. PERSONALITY & SOC. PSYCHOLOGY 1198, 1199 (1983).

44. *Cf.* Funder, Block, & Block, *supra* note 43, at 1199 (delay of gratification and ego control as "positively associated with childhood family environments emphasizing structure, order, and conservative values and . . . negatively associated with conflict in the home").

inclination as a society to honor the progressive intergenerational partnership may vary over time and may be in the process of generally diminishing.

B. Future Generations and the Equal Protection Clause

The argument for a constitutionally enforceable commitment to posterity is not solely dependent upon the premises that our societal commitment to the future is diminishing, and that this trend should somehow be stopped. Even if our societal commitment to the future were not trending downward, there would still be a need for constitutional protection for future generations.

This need is best illustrated by applying contemporary equal protection theory to the problem of the interests of future generations. Doubtless more than one generation is enfranchised and voting at any given time, and there is always a tendency of some strength for the voters to incorporate the interests of their own descendants into their own preferences. Voters tend to care, to some degree, about their own or others' children and grandchildren.

But this still leaves the interests of future generations chronically and systematically underrepresented in the electoral process whenever the interests of present and future diverge. It is all very well to "pressure legislators to take the interests of posterity into account,"[45] but future generations themselves are literally silent politically.[46] They also have little if any current bargaining power, and little with which to reward or threaten the current generation of legislators.[47] Any current generation of legislators must, for the sake of maximizing the probability of electoral survival, itself be oriented toward relatively short-term benefits for constituents.[48]

John Hart Ely's approach[49] to the equal protection clause provides at least a partial remedy for the inevitable tendency of electorally responsive legislators to skew their legislation in favor of short-term results, and in favor of the currently enfranchised. On

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45. Kavka, *supra* note 16, at 189.

46. *See* Epstein, *Justice Across Generations*, 67 TEX. L. REV. 1465, 1465 (1989).

47. *See* J. GLOVER, WHAT SORT OF PEOPLE SHOULD THERE BE? 145 (1984); Barry, *supra* note 17, at 271. Posterity will eventually exercise some control over a current legislator's reputation or place in history, but this factor may not tip the balance even on close votes.

48. *See* Epstein, *supra* note 46, at 1467, 1481. Professor Epstein favors limited government, rather than an equal protection-based approach, as a response to this problem. For a broader constitutional approach, see generally G. BRENNAN & J. BUCHANAN, THE REASON OF RULES (1986); J. BUCHANAN, LIBERTY, MARKET AND STATE (1986).

49. *See generally* J. ELY, DEMOCRACY AND DISTRUST (1980).

Ely's representation-reinforcing approach, the equal protection clause[50] may be interpreted so as to neutralize systematic legislative underrepresentation[51] of relatively powerless,[52] non-participating[53] groups. Of course, it would be going too far to think of future generations as the stigmatized victims of some ideology according to which they are inferior.[54] But the fact that future generations are not stigmatized as inferior does not mean that their interests are effectively represented legislatively. If, as Ely observes, "nonresidents are a paradigmatically powerless class politically,"[55] then so are future generations. Future generations might well be thought of as a subcategory of nonresidents, in that they are, for practical electoral purposes, not-yet-residents.

The point of granting constitutional equal protection to future generations is primarily to attempt to neutralize the systematic, inevitable legislative bias in favor of those who can organize, contribute to campaigns, and vote. Judges, particular-ly tenured Article III judges, charged with enforcing the equal protection of the laws face different reward and incentive structures than do legislators. Judges may personally feel no more solicitous than legislators of the interests of posterity, but they need not fear retaliation for taking the interests of future generations fairly into account.

It is worth recalling that the framers of the Constitution implicitly recognized posterity as what might be thought of as a distinct category.[56] Admittedly, the case law of posterity under the equal protection clause is minimal at best.[57] In part, this dearth of case law reflects legitimate questions of standing, ripeness, and justiciability,

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50. The essential logic of the fourteenth amendment's equal protection clause is binding on the federal government via the due process clause of the fifth amendment. *See* Bolling v. Sharpe, 347 U.S. 497 (1954).

51. *See* J. ELY, *supra* note 49, at 82.

52. *See id.* at 83.

53. *See id.* at 87.

54. For the classic such case, see Brown v. Board of Educ., 347 U.S. 483 (1954). It should be noted, though, that our argument does not require that any legislative classifications adverse to the interests of future generations receive rigorous "strict scrutiny" from the courts. *Compare* City of Richmond v. J. A. Croson Co., 109 S. Ct. 706, 721 (1989) (strict scrutiny imposed in remedial racial discrimination case) *with* Craig v. Boren, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring) (arguing that equal protection clause "does not direct the courts to apply one standard of review in some cases and a different standard in other cases"). In our context, there is no need for a special, distinctive level of judicial scrutiny beyond determining that federal budgetary and savings policy can reasonably be accounted for on some basis other than the inclination to disproportionately shift substantial costs to future generations.

55. J. ELY, *supra* note 49, at 83.

56. *See* U.S. CONST. preamble.

57. The district court opinion in *Bolden v. City of Mobile* quotes the preamble's reference to posterity in the context of an assertion of the right to equal treatment under

which will be addressed in the concluding section below. But the absence of relevant case law also reflects the fact that the problem of unjust legislative treatment of future generations has only quite recently become severe. This in turn is due in part to technological change[58]—early legislators could not have left the problems of radioactive waste with long half-lives, the depletion of the ozone layer, or global warming to be solved by future generations, even if they had been so inclined. The increased importance of the claims of the future reflect unattractive cultural trends as well, several of which are considered in the following section.

III. THE CONTEMPORARY DISINCLINATION TO SACRIFICE: SOME MANIFESTATIONS AND LIMITS

As a society, Americans have, it seems, typically been willing to respond favorably to an appeal for reasonable sacrifice for the sake of the future.[59] Peter Laslett has suggested that "it would be very difficult to find an example from the past where one 'generation' did spend their savings in a way which caused suffering to their successors . . . ."[60] Finding a current such example has recently become less difficult. Professor Benjamin Friedman has spoken for many in arguing that

> [t]he trouble with an economic policy that artificially boosts consumption at the expense of investment, dissipates assets, and runs up debt is simply that each of these outcomes violates the essential trust that has always linked each generation to those that follow. We have enjoyed what appears to be a higher and more stable standard of living by selling our and our children's economic birthright.[61]

Professor Friedman's concerns focus on one manifestation of an underlying spirit of the age. It has perhaps always been true that to some degree our limited imaginations, limited empathy, and limited identification with the future has biased our decisionmaking against

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the equal protection clause, but the linkage is not made explicit. 423 F. Supp. 384, 402-03 (S.D. Ala. 1976), *aff'd*, 571 F.2d 238 (5th Cir. 1978), *rev'd*, 446 U.S. 55 (1980).

58. *See* Baier, *For the Sake of Future Generations*, in EARTHBOUND 214, 214 (1984).

59. *See* Laslett, *supra* note 6, at 45.

60. *Id.* at 54.

61. B. FRIEDMAN, DAY OF RECKONING 5 (1988). It may be argued that our economic policies have not truly destroyed anyone's birthright, but merely transferred much of that birthright to other nations, thus preserving the value of that birthright for at least humanity in general. This, however, would still be rightly objectionable to those whose birthright has been sold without accounting for the proceeds, as it is they, as persons within the United States and not humanity in general, who are the intended primary beneficiaries of the equal protection clause.

posterity and toward the present.[62] We should not exaggerate or romanticize the commitment of past generations to the future. Past generations may, for example, have simply lacked the technical capacity to generate massive amounts of toxic wastes posing multigenerational risks. Just as important, however, is the contemporary sense that the degree of empathy for, identification with, and concern for future generations is historically variable, and in fact is diminishing in our time.

Along these lines, Christopher Lasch has argued that "we are fast losing the sense of historical continuity, the sense of belonging to a succession of generations originating in the past and stretching into the future."[63] Correspondingly, according to Professor Lasch, there is occurring an "erosion of any strong concern for posterity."[64] This erosion of self-restraint with respect to future generations is obviously of great importance.[65] The focus of this Article, however, is not on constitutionally restraining anything as ethereal as the "spirit of the age," or on declaring a cultural trend or ambience to violate the equal protection clause. As the economist James Buchanan has emphasized, this erosion of moral constraint has manifested itself concretely in the functioning of our political institutions.[66] Mortgaging the future, as well as other forms of major resource transfers from the future for the sake of general present consumption, are not merely vague cultural trends, but "legislated public policy."[67] It is hardly unprecedented to apply constitutional equal protection tests to cultural trends formally embodied in legislation.

A. Divorce and Child Support Law As Intergenerational Redistribution

Recent changes in the law and practice of divorce in cases in which the spouses have minor children provide an illustration of the general cultural trends briefly alluded to above. This is not to deny that parents have ceased to incorporate the welfare of their children into their own decisions about how much and when to consume,[68] or even that parents have ceased to realize that their children will in

62. *See* J. GLOVER, *supra* note 47, at 147.

63. C. LASCH, THE CULTURE OF NARCISSISM 30 (1979).

64. *Id.*

65. *See* J. BUCHANAN, *supra* note 48, at 189; Wilson, *The Rediscovery of Character: Private Virtue and Public Policy*, 81 PUB. INT. 3, 16 (1985).

66. *See* J. BUCHANAN, *supra* note 48, at 189. *See also* Wilson, *supra* note 65, at 10-11 (quoting Professor Buchanan).

67. B. FRIEDMAN, *supra* note 61, at 5.

68. *See* Epstein, *supra* note 46, at 1472.

turn care about their own children.[69] But there is no obvious reason why the degree to which parents are inclined to sacrifice in order to safeguard the legitimate interests of their children must remain historically constant.[70]

There is in fact a growing body of evidence suggesting that, at least over the last century or so, "the family bond has become progressively tenuous."[71] While the net effect of such changes has, as we shall see immediately below, been in many cases to the substantial detriment of the children directly affected, the adverse impact on children has not markedly slowed the legal system's accommodation of changes in family patterns. As has been observed in this context, "within some limits, adult needs and the pressures of economic forces, not children's needs, determine family patterns in this world. As changes occur, what is good for children is conveniently redefined."[72]

Mary Ann Glendon has recently summarized certain changes in the law and practice of divorce as involving a movement from no-fault to no-responsibility divorce.[73] Professor Glendon suggests that

> [t]he American story about marriage, as told in the law and much popular literature, goes something like this: marriage is a relationship that exists primarily for the fulfillment of the individual spouses. If it ceases to perform this function, no one is to blame and either spouse may terminate it at will . . . . Children hardly appear in the story; at most they are rather shadowy characters in the background.[74]

As background figures, the children of divorce are often called upon to suffer not so much along with the parents, but in ways that reflect a redistribution of income, well-being, and security in favor of at least one parent. It is hardly clear that the legal system operates in such a way as to require the parents to take full and appropriate account of any substantial, enduring costs that may in many cases be imposed by divorce on the minor children. Instead, the costs of di-

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69. *See* Hubin, *Justice and Future Generations*, 6 PHIL. & PUB. AFF. 70, 78 (1976).

70. *See* Chambers, *The Coming Curtailment of Compulsory Child Support*, 80 MICH. L. REV. 1614, 1625 (1982) ("Over the coming decades, it is possible that most divorced, noncustodial parents will become even more detached from their children by a previous relationship than they are today").

71. Golding, *supra* note 6, at 95 n.8.

72. Chambers, *supra* note 70, at 1626.

73. M. GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 104-05 (1987).

74. *Id.* at 108.

vorce are often largely "externalized" to the children, although some of these costs are ultimately borne by society at large as well.[75]

One aspect of the intergenerational redistribution often involved focuses on child support. Whether child support is actually paid as agreed or adjudicated or not, the amounts set "are too low, as a rule less than what noncustodial parents can afford, and typically less than half of what it costs to raise a child at a minimally decent level."[76] The equally significant redistribution of long-term[77] psychological well-being following upon divorce is also, at least in some respects, typically unfavorable to the children, a fact not lost on the children themselves.[78] These effects are not utterly uncontrollable judicially.

This is of course not to suggest in the slightest that divorce is typically casually undertaken, or that divorce does not commonly involve adult, and typically female, victims. For our purposes, though, it is important to bear in mind not only the adult female victims of divorce, but that divorce "is almost always more devastating for children than for their parents."[79] In a study undertaken by Judith Wallerstein, "almost half of the children [of divorced parents] entered adulthood as worried, underachieving, self-deprecating . . . young men and women."[80] Diminished parenting after divorce often becomes permanent.[81] Some children of divorce are forced to literally raise themselves,[82] perhaps in addition to caring for a troubled parent.[83] Nor does the evidence suggest that the severity of the redistributive consequences of divorce on the children in frequent cases has lessened with the increasing prevalence and societal acceptance of divorce.[84] If anything, the opposite may be the case.[85]

Wallerstein reasonably expresses skepticism that all conceivable marital and divorce laws and practices extend the same degree of protection to the children.[86] Echoing Professor Glendon,[87] Waller-

75. *See* J. WALLERSTEIN & S. BLAKESLEE, SECOND CHANCES xxi, 307 (1989).
76. M. GLENDON, *supra* note 73, at 87.
77. *See* J. WALLERSTEIN & S. BLAKESLEE, *supra* note 75, at xii.
78. *See id.* at xvii.
79. *Id.* at 297.
80. *Id.* at 299. See *also* L. WEITZMAN, THE DIVORCE REVOLUTION 321-22 (1985) (children of divorce as often "pervasively unhappy, distrustful, and pessimistic" as result).
81. *See* J. WALLERSTEIN & S. BLAKESLEE, *supra* note 75, at 301-02.
82. *See id.* at 299.
83. *See id.* at 299, 303.
84. *See id.* at 303.
85. *See id.*
86. *See id.* at 305; Chambers, *supra* note 70, at 1626.

stein concludes that "the voices of our children are not represented in the political arena. Although men and women talk *about* children, it is hard for me to believe that they are necessarily talking for children."[88] This is close to the essence of the problem that the equal protection clause can assist in solving.[89] While statutory reform is doubtless essential, it can no longer be ignored that minor children of divorcing parents do not vote or otherwise directly influence the electoral process themselves in traditional ways. Young children do have an important political advantage over persons not yet born, in that they are visible and concrete, as opposed to mere abstractions. Despite the best efforts of advocacy groups on their behalf, we should, however, expect statutorily enacted law to tend systematically to unduly discount the interests of the children of divorce. That the children affected are merely too young to significantly affect the political process does not distinguish them in principle from those who cannot significantly affect the political process because they do not yet exist.

B. Reduced Savings Rates and Unproductive Deficits As Intergenerational Transfers

Increasingly, there is a sense that whatever prosperity our society enjoys is not so much a matter of fate, but a reflection in some measure of the degree of solicitude for the interests of later generations shown by earlier generations. As a number of observers have noted, recently we have apparently made tacitly the collective decision to benefit economically, in a number of respects, at the expense of future generations.

The chronic federal budget deficit, to the extent that such a deficit expands general current consumption as opposed to productive investment,[90] poses an issue of intergenerational morality. As Rudolph Penner has observed, "the issue of deficit reduction is really an issue of the relative wellbeing of different generations as measured by their consumption. The question involves a moral value

87. *See* M. GLENDON, *supra* note 73, at 108.

88. J. WALLERSTEIN & S. BLAKESLEE, *supra* note 75, at 305 (emphasis in the original). The minimal political influence of young children may also help to account for the chronic, severe deprivation of educational opportunities inflicted on a substantial number of public school children. *See generally* Wright, *The Place of Public School Education in the Constitutional Scheme*, 13 S. ILL. U.L.J. 53 (1988).

89. For a discussion of the effects of the equal protection clause on future generations see *supra* notes 49-55 and accompanying text.

90. *See* Modigliani, *Life Cycle, Individual Thrift, and the Wealth of Nations*, 76 AM. ECON. REV. 297, 311 (1986).

judgment. How well do we want to treat our children and grandchildren?"[91]

The current generation, having available to it the deinhibiting effects of various forms of Keynsianism, has, as Professors Buchanan[92] and Wilson[93] have noted, succumbed to a temptation that has in some sense always been present for all modern generations: to change the terms of the intergenerational partnership in their favor. Professor Buchanan has noted a primary consequence of such change: "the issue of debt for the purpose of financing current-period use or consumption is equivalent to the destruction of the capital value of the asset stream that is anticipated."[94] Public debt in such circumstances has the effect of an intergenerational redistribution.[95] Nor has our public debt been incurred exclusively to remedy other equal protection or other constitutional violations by the government.

It is important for our purposes to recognize that however abhorrent large-scale intergenerational redistribution against future generations may be from the standpoint of the Burkean progressive partnership, there is no reason to suppose that ordinary, nonconstitutional political mechanisms will eventually suppress such a phenomenon. The benefits of deficit reduction are long-term[96] and accrue in substantial measure to non-voters.[97] Any progress in deficit reduction contributed to by voters at one time may be utterly undone in the following time period.[98] Politicians sufficiently heroic to promise redress in favor of those who are not yet voters will tend to be outbid in electoral competition.[99] If the moral problem is to be reliably solved, then, it must be solved by constitutional mechanisms that bypass traditional electoral competition.[100] The focus of constitutional constraint, again, need not be on diffuse private behavior, but on statutorily enacted public policy.[101]

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91. Penner, *The Economics and the Morality of the Budget Deficit*, 23 BUS. ECON. 6, 8 (1988).

92. *See supra* notes 65-66 and accompanying text.

93. *Id.*

94. J. BUCHANAN, *supra* note 48, at 197.

95. Persson, *Deficits and Intergenerational Welfare in Open Economics*, 19 J. INT'L ECON. 67, 83 (1985).

96. White & Wildavsky, How to Fix the Deficit—Really, 94 PUB. INT. 3, 13 (1989).

97. *See* J. BUCHANAN, *supra* note 48, at 205.

98. *See* G. BRENNAN & J. BUCHANAN, *supra* note 48, at 94.

99. *See* Crain & Ekelund, *Deficits and Democracy*, 44 S. ECON. J. 813, 827 (1978).

100. *See* G. BRENNAN & J. BUCHANAN, *supra* note 48, at 81, 93.

101. See B. FRIEDMAN, *supra* note 61, at 5.

A similar analysis can be made of our society's declining[102] and relatively low[103] national savings rate. While this overall decline reflects diminution in personal and business saving as well as government saving,[104] the sharpest decline over the past decade has been in government saving,[105] the component most directly amenable to constitutional control. The intergenerational consequences of this savings pattern are reasonably clear. Reduced national savings reduces investment for the future.[106] To some limited degree, this might be compensated for by such mechanisms as foreign borrowing for investment purposes. The bulk of our foreign borrowing, however, has gone to maintain or enhance current consumption rather than investment.[107] Reduced investment inevitably reduces the growth of future living standards.[108] The present does better at the expense of the future.[109]

The same redistributive consequences are manifested in the funding mechanisms of government programs. The early generations of the Social Security retirement system received far more in benefits than they contributed.[110] More importantly, "middle-income household heads in the cohort to be born in 1990 are projected over their lifetimes to lose, on net, roughly $60,000 in present value as a consequence of participating in Social Security."[111] The beneficiaries of such transfers are, not surprisingly, among those currently voting. Social Security expenditures over the past twenty years or so have admirably reduced poverty among the aged, along with generally enhancing the economic well-being of the retired.[112] This is

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102. Bosworth, *There's No Simple Explanation for the Collapse in Saving*, CHALLENGE, July-Aug. 1989, at 27, 27; Summers & Carroll, *Why Is U.S. National Saving So Low?*, 1987 BROOKINGS PAPERS ON ECON. ACTIVITY 607, 607.

103. Summers & Carroll, *supra* note 102, at 607.

104. Nordhaus, *What's Wrong with a Declining National Saving Rate?*, CHALLENGE, July-Aug. 1989, 22, 22.

105. *Id.* at 22-23. See *also* Summers & Carroll, *supra* note 102, at 635 (changes in government's fiscal posture as most potent way to increase national saving).

106. Nordhaus, *supra* note 104, at 23.

107. Bosworth, *supra* note 102, at 27. *See also* Hooper, *U.S. Net Foreign Saving Has Also Plunged*, CHALLENGE, July-Aug. 1989, at 33 (discussing recent shift in American position to one of substantial net foreign indebtedness).

108. Gramlich, *Budget Deficits and National Saving: Are Politicians Exogenous?*, 3 J. ECON. PERSPECTIVES 23, 33 (1989); Nordhaus, *supra* note 104, at 23.

109. *See* Nordhaus, *supra* note 104, at 23.

110. Kotlikoff, *Deficit Delusion*, 84 PUB. INT. 53, 62 (1986).

111. *Id.* For a discussion of the inability of Social Security trust fund surpluses to reduce chronic federal budget deficits substantially, see Penner, *supra* note 91, at 9.

112. Summers & Carroll, *supra* note 102, at 626; Coder, Rainwater & Smeeding, *Inequality Among Children and Elderly in Ten Modern Nations: The United States in an International Context*, 79 AM. ECON. REV. 320, 323 (1989).

in itself of course praiseworthy. No comparable improvement has been achieved in the realm of child poverty.[113]

It has been argued that reduced government savings is not as significant as might be imagined, in that there will be a countervailing tendency for rational citizens to detect and offset reduced government savings by increasing their own private savings.[114] This view, implied by the Ricardian equivalence theorem, has attracted a certain degree of support,[115] and if robustly true would mitigate the intergenerational effects of reduced government savings. The majority view,[116] however, seems to be that Ricardian equivalence depends crucially on narrow and unrealistic assumptions[117] and that it has not been persuasively borne out by the evidence of recent economic history.[118]

It is also possible to argue that increased current consumption, at least during periods of substantial unemployment, may involve no significant adverse generational effects, in that such increased consumption, supplied by underutilized resources, leads to greater, not less investment, and involves no significant borrowing from future generations.[119] Again, if this actually captured the essence of the fiscal history of the last decade, the intergenerational impact of federal budget policy would be mitigated. Unfortunately, the evidence appears to suggest that the federal budget deficits of the 1980s have not had the effect of raising national saving, via a stimulative effect, along with current consumption.[120] The singularly nontechnical language of Benjamin Friedman has it that "America has thrown itself a party and billed the tab to the future."[121] Whether the term "party" is entirely apt is doubtful, given the vague but pervasive sense of a society anxiously seeking by the least immediately uncomfortable means to merely maintain and preserve, if temporarily, its accustomed growth in consumption. The effect on future generations is, however, the same.

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113. *See* Coder, Rainwater & Smeeding, *supra* note 112, at 323.

114. *See* Barro, *The Ricardian Approach to Budget Deficits*, 3 J. ECON. PERSP. 37, 45 (1989); Barro, *Are Government Bonds Net Wealth?*, 82 J. POL. ECON. 1095 (1974).

115. *See, e.g.*, Epstein, *supra* note 46, at 1478.

116. *See* Penner, *supra* note 91, at 11 n.3.

117. *See* Lindbeck & Weibull, *Intergenerational Aspects of Public Transfers, Borrowing and Debt*, 88 SCAND. J. ECON. 239, 241-42 (1986); Modigliani, *supra* note 90, at 310-11.

118. *See* Bernheim, *A Neoclassical Perspective on Budget Deficits*, 3 J. ECON. PERSP. 55, 67 (1989); Eisner, *Budget Deficits: Rhetoric and Reality*, 3 J. ECON. PERSP. 73, 73 (1989); Gramlich, *supra* note 108, at 28-29; Summers & Carroll, *supra* note 102, at 610-17.

119. *See* Eisner, *supra* note 118, at 74.

120. Gramlich, *supra* note 108, at 33-34.

121. B. FRIEDMAN, *supra* note 61, at 4.

C. *Long-Term Environmental Protection As a Test Case*

The protection of future generations against environmental disaster poses a number of intriguing philosophical issues. These issues will be discussed in the section immediately below. In the meantime, it is worth considering an encouraging, if unfulfilled, federal statutory recognition of the interests of future generations in the area of environmental policy.

The National Environmental Policy Act explicitly recognizes the environmental requirements of future generations.[122] The Burkean notion of generational trusteeship of the environment is invoked.[123] The Environmental Impact Statement required of federal agencies contemplating action significantly affecting the environment is statutorily directed to include reference to certain tradeoffs between short-term use of the environment and long-term productivity.[124]

Despite such language, there remain legitimate grounds for concern that the environmental interests of future generations are not adequately safeguarded by the National Environmental Policy Act. The Act itself does not mandate that actual substantive results or decisions reflect environmental values.[125] The requirement is instead merely that potential environmental consequences be considered, procedurally, in the decisionmaking process.[126] As well, it is disturbing that under the case law, the remoteness in time of some potential adverse environmental impact is often coupled with the highly speculative or conjectural quality of the impact as a reason for not requiring that the particular impact in question be discussed in the Environmental Impact Statement.[127] The Supreme Court, finally, has declined to require that the agency prepare a "worst case analysis" in the face of environmental impacts of uncertain severity or probability.[128] While this is perhaps reasonable on its own

122. *See* 42 U.S.C. § 4331(a)(1982).

123. *See id.* § 4331(b)(1).

124. *See id.* § 4332(C)(iv); NRDC v. Administrator, 451 F. Supp. 1245, 1264 (D.D.C. 1978).

125. *See* Robertson v. Methow Valley Citizens Council, 109 S. Ct. 1835, 1846 (1989) (citing Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227-28 (1980) (per curiam)); Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978)).

126. *See Robertson*, 109 S. Ct. at 1846. Other, perhaps more limited, federal statutes may impose substantive, if not particularly future-oriented, environmental restrictions. *See id.* at 1846, 1846 n.14.

127. *See, e.g.*, Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1026 (9th Cir. 1980); Environmental Defense Fund, Inc. v. Hoffman, 566 F.2d 1060, 1067 (8th Cir. 1977); Sierra Club v. Hodel, 544 F.2d 1036, 1039 (9th Cir. 1976).

128. *See Robertson*, 109 S. Ct. at 1847-48.

terms,[129] it may imply a practical bias against the future, to the extent that "worst case" outcomes may be disproportionately likely to cumulate in the relatively long-term, as opposed to short-term, future.

It is doubtless premature to attempt to determine whether the National Environmental Policy Act, by itself or in conjunction with other substantive environmental statutes,[130] has worked to significantly constrain the shifting of environmental costs and risks onto politically unenfranchised future generations. A skeptical observer has concluded that "the behavioral intention of the present generation of Jefferson's descendants is to enjoy as many blessings of liberty as they can while leaving to posterity . . . a used up garbage dump."[131] If so, then environmental law, no less than federal budget policy, will reflect what may well amount to a partial repudiation of the Burkean generational partnership.

IV. Rights and Future Generations

A. The Moral Status of Future Persons

Future persons, whatever advantages they may come to possess, face the disadvantage, from our standpoint, of being abstract, disembodied, impersonal, and contingent. One writer has been sufficiently forthright to proclaim that "the hordes of future 'neighbors' will have to put up with my indifference. Future beings, being nonbeings, can have no demands to make upon me. Even if they did, they have no reality, save potential reality, sufficient to establish an emotional bond of identification with me."[132]

The inclination among the philosophically minded to deny that we owe moral obligations to future generations, or that the latter have rights or just claims meriting current respect, is actually quite strong.[133] This skepticism reflects not merely the abstractness of future generations, but other considerations as well. How, it is

129. Worst-case effects may be of obvious, undeniable severity. *See Gribble*, 621 F.2d at 1026.

130. *See supra* note 126 and the statutes referred to therein. *See also* Resource Conservation and Recovery Act, 42 U.S.C. § 6903(5) (1983) (defining "hazardous waste" partially in terms of potential, as opposed to present, risks).

131. Thompson, *supra* note 13, at 199.

132. *Id.* at 201.

133. *See, e.g.*, Ball, *The Incoherence of Intergenerational Justice*, 28 Inquiry 321, 323 (1985); Golding, *supra* note 6, at 89; Hubin, *supra* note 69, at 70-71, 79; Laslett, *supra* note 6, at 46; Macklin, *Can Future Generations Correctly Be Said to Have Rights?*, in Responsibilities, *supra* note 3, at 152.

asked, can persons not yet born have rights against us now?[134] A present right presumably implies a present rightholder. Justice is non-arbitrarily a matter of relations between contemporaries,[135] because justice depends upon the possibility of reciprocal conferral of substantial benefits[136] and reciprocal vulnerability between members of the moral community.[137] The very possibility of communication between the generations is necessarily one-way.

As well, it is predictable that both the meaning of justice and what counts as an interest, or an injury to interests, will change over the course of the generations.[138] Nor is the direction of such changes itself predictable.[139] Thus a further indeterminacy is lent to the idea of justice between generations. Ultimately, it is thought, the idea of intergenerational justice, at least between distant generations, may be incoherent.[140] On such a theory, obligations owed directly to future generations reduce to mere generosity, or mercy,[141] or to an utterly unprincipled mere preference.[142]

One way of limiting the adverse intergenerational impact of these implications is through arguing that either our own psychic well-being[143] or the interests of our own living children and grandchildren and other younger contemporaries[144] require actions at least indirectly promoting the likely interests of future generations. We may owe present duties concerning or in respect of,[145] if not directly to, future generations because of our obligations to respect the rights-claims of presently existing persons.[146]

Sole reliance on this escape hatch, however, to a degree falsifies our moral sentiments. The obligations of the Burkean partnership have traditionally not been confined to only the most directly related links in the generational chain. Matters such as contempora-

134. *See, e.g.*, Golding, *supra* note 6, at 89. *See generally* DeGeorge, *The Environment, Rights, and Future Generations*, in ETHICS AND PROBLEMS OF THE 21ST CENTURY 93 (1979).

135. *See* Hubin, *supra* note 69, at 79.

136. *See id.* at 71.

137. *See id.* at 79.

138. *See* Ball, *supra* note 133, at 322.

139. *See id.*

140. *See id.* at 323.

141. *See id.* at 328.

142. *See* Bennett, *supra* note 2, at 66.

143. *See* Partridge, *Why Care About the Future?*, in RESPONSIBILITIES, *supra* note 3, at 209.

144. *See* Dipert, *Reflections on the Rights of Future Generations*, in RIGHTS AND REGULATION: ETHICAL, POLITICAL, AND ECONOMIC ISSUES 210 (1983); Hubin, *supra* note 69, at 80; Schwartz, *Obligations to Posterity*, in OBLIGATIONS, *supra* note 2, at 12-13.

145. *See* Delattre, *Rights, Responsibilities, and Future Persons*, 82 ETHICS 254, 256 (1972); Dipert, *supra* note 144, at 206; Hubin, *supra* note 69, at 80.

146. *See, e.g.*, Delattre, *supra* note 145, at 256; Dipert, *supra* note 144, at 206; Hubin, *supra* note 69, at 80.

neity, reciprocity of benefit, and reciprocity of vulnerability may help explain how just institutions might actually or hypothetically arise as a result of disinterested bargaining. But we can hardly rule out in principle the idea of a valid moral norm committing us to respect the interests of those who literally cannot bargain with us, or who have little to offer or bargain with, or who cannot substantially threaten our own interests in turn.[147] These considerations obviously bear upon matters such as whether it is in our self-interest to treat future generations on the basis of equality, but equality among the generations may be antecedently morally binding, whether it is in our narrow self-interest to agree to this or not.

We might, for example, on some theories be said to owe something to future generations by virtue of our partially voluntary acceptance of benefits conferred on us by the sacrificial efforts of past generations who can be properly repaid in no other way.[148] There seems an element of arrogance and of grotesque impropriety in repudiating our Burkean obligations to the future, whether this would be self-interestedly rational for us or not.[149] If distance in space does not in principle bar any moral obligations from arising, neither, on such a view, does distance in time.

This point is often illustrated by shifting the future obligation problem backward in time, so that we as the current generation become the beneficiary of an intergenerational obligation. Consider, for example, an unusually creative, if malicious, 18th century Philadelphia inventor who deposits a large quantity of poison gas in a container he knows will rupture in precisely 200 years. Let us suppose further, for the sake of justiciability, that he has, as a cryogenics pioneer, also left himself a wake-up call for six months after the escape of the poison gas. What can be said, in terms of moral and legal rights and obligations, when the gas escapes, resulting in multiple deaths and injuries, and the inventor thaws out?[150]

It would hardly appear to involve some fallacy of moral reasoning to condemn the inventor's actions as in breach of a moral obligation, or even to find him criminally liable. Yet consider what the inventor could say in his defense. His victims did not exist at the

147. *But cf.* Hubin, *supra* note 69, at 79-80 (discussing requisites of mutual vulnerability and possibilities for cooperation). Again, this picture is clouded a bit by the eventual power of future generations over our continuing reputations.

148. *See* Callahan, *supra* note 6, at 77.

149. *See* Hartshorne, *supra* note 9, at 107.

150. This hypothetical derives from those posed in, among others, R. Sartorius, *Governmental Regulation and Intergenerational Justice*, in RIGHTS AND REGULATION: ETHICAL, POLITICAL, AND ECONOMIC ISSUES 197 (1983) and M.A. Warren, *Future Generations*, in AND JUSTICE FOR ALL 148 (1982).

time of the act for which he is condemned. It was uncertain whether there would be any people at all in existence at the time the container ruptured.[151] Such persons might, for all the eighteenth century inventor knew, possess some sort of immunity or protection from the poison gas. Perhaps they would regard what was formerly a poison gas as a valuable resource. Certainly an eighteenth century inventor could imagine that in two hundred years' time, ethical codes would have changed extensively, in unpredictable ways.[152] All of this would be true, but none of it would be of great moral significance.

Admittedly, there remains something logically awkward about ascribing rights, at least in the present, to not-yet-existing generations.[153] The problem is not merely the long delay between the culpable act and the first indication of harm; it is more a matter of a supposed present right without a present rightholder. This sort of awkwardness has led to attempts to circumvent the problem by grounding the moral wrongness in purely utilitarian concerns, with no reference to rights.[154] Such attempts may not be fully satisfactory, though. What if it could be shown, all else equal, that we, in our exquisitely sensitive narcissism, have gained slightly greater utility from the past decade of economic self-indulgence than will be lost by the perhaps more stoic, responsible future generations by virtue of their picking up the tab? Our conduct would still remain a moral embarrassment.

The concept of equal protection of the laws speaks at least as much to state obligations and responsibilities as it does to individual recipient rights. The equal protection, by law, of future persons is not an incoherent notion. One writer has suggested that "by saying that future generations have rights against existing generations we can simply mean that there are enforceable requirements upon existing generations that would benefit or prevent harm to future generations."[155] There seems at least enough sense in such a locution to drive the operation of the equal protection clause as the relevant source of legally enforceable requirements. Certainly, as we shall see below, the law at least occasionally makes provision for the re-

151. *But cf.* Pletcher, *The Rights of Future Generations*, in RESPONSIBILITIES, *supra* note 3, at 169 (obligation to leave one's campsite clean for future campers as independent of actual future use of that site).

152. *See* Ball, *supra* note 133, at 334 (future generations as unlikely to regard with indifference a range of phenomena now regarded as grievous ills).

153. *See* J. STERBA, THE DEMANDS OF JUSTICE 137 (1980).

154. *See* Macklin, *supra* note 133, at 154.

155. J. STERBA, *supra* note 153, at 138.

covery in tort of persons not conceived at the time of the alleged injurious act.[156]

If it is still insisted that equal protection depends crucially on rights-talk, rather than obligations or responsibilities, and that rights-talk is in our context logically peculiar, one final reply is possible. If there is indeed a conflict between the way we ordinarily conceive of rights and the recognition of meaningful rights in future persons, this shows only that one or the other way of thinking must be adjusted. Perhaps it is the concept of rights that should be tailored to fit our increasing capacity and inclination to work intergenerational injury. Perhaps we should not retain unmodified our prior metaethical understanding of rights at the substantive expense of future persons. Stretching the concept of rights, or applying it in unorthodox contexts, may well be justifiable in particular kinds of cases.[157] On the issue of obligations of present to future generations, we are inevitably judges in our own case. If we find such obligations, it is we who are bound; if we do not, we are off the hook. Given our current proclivity for self-indulgence, we should resolve any close intellectual questions in favor of the interests of the future.

B. The Problem of Future Generation Identity

Doubts as to obligations to future generations should not, however, be dismissed without at least brief reference to a distinctive and intriguing problem posed most elaborately by the philosopher Derek Parfit. Parfit[158] and others[159] have argued, essentially, that the very identities of those people who will come to make up future generations is, in the present, highly contingent, and dependent upon, among other things, our broad societal economic, environmental, and other policies. A societal policy of gross generational self-indulgence may, on Parfit's assumptions, itself be responsible for different future people coming into being than those who would have been born had a more generationally responsible policy been adopted. Thus it is, on Parfit's view, open for the earlier generation to reply to the complaints of the later generation in the following way: Had we, the earlier generation, behaved as you suggest we

156. *See infra* note 182 & accompanying text.

157. *See* Rose, *Environmental Faust Succumbs to Temptations of Economic Mephistopheles, or, Value by Any Other Name is Preference* (Book Review), 87 MICH. L. REV. 1631, 1645 (1989) (citing Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987)).

158. *See* D. PARFIT, REASONS AND PERSONS 351-79 (1984); Parfit, *Future Generations: Further Problems*, 11 PHIL. & PUB. AFF. 113 (1982).

159. *See, e.g.*, Schwartz, *Obligations to Posterity*, in OBLIGATIONS, *supra* note 2, at 4.

should, you would not now, individually, have been born. You, with your own established identity, would not have been around to complain. Ask yourselves whether your imagined injuries at our hands are such that it would have been better for you never to have been born. If not, you are not worse off than you would have been had we, the previous generation, behaved as you now assert we should. You have therefore suffered no cognizable injury.

For the sake of discussion, we may accept the assumptions as to personal identity and reproductive biology required by Parfit's widely-discussed[160] argument. Assuming that Parfit's argument "works," it is not without significant implications. Professor Robert Nozick, for example, has interpreted the "Lockean Proviso," or the minimal obligation of early generations with respect to providing for the resources and opportunities to be available for later generations, in terms of ensuring that members of later generations are not made worse off than they would have been had the earlier generation not appropriated resources as they did.[161] On Parfit's assumptions, however, a change in general property law changes who will exist in the future. To avoid Parfit's identity problem, Nozick's argument would have to be consistently stated not in terms of future persons being at least as well off as they themselves would have been in a state of nature, but in terms of the rights of all individuals to have access to enough and as good resources as was available to their predecessors.[162]

As the example of Nozick's theory shows, however, it will often be possible to avoid the force of Parfit's argument by recasting or even by merely carefully stating the moral assertion in question. Parfit's argument does not affect comparisons between the welfare of, for example, persons actually born and those who would have been born had earlier generations adopted more responsible economic and environmental policies.[163] Thus it is still possible for any member of a future generation to object that she is in a worse position than some corresponding person who would in some sense have taken her place had earlier generations shown less self-indulgence. Any member of a future generation will also be able to claim that she has been treated unjustly by a prior generation by comparison

160. *See, e.g.*, Baier, *supra* note 58, at 222; Bayles, *Harm to the Unconceived*, 5 PHIL. & PUB. AFF. 292, 297-98 (1976); Kavka, *The Paradox of Future Individuals*, 11 PHIL. & PUB. AFF. 93 (1982); Warren, *supra* note 150, at 153.

161. *See* R. NOZICK, ANARCHY, STATE AND UTOPIA 175 (1974). For a discussion of this aspect of Nozick's theory, see Elliot, *Future Generations, Locke's Proviso and Libertarian Justice*, 3 J. APPLIED PHIL. 217 (1986).

162. *See* R. NOZICK, *supra* note 161, at 175.

163. *See* Baier, *supra* note 58, at 233.

with how that prior generation treated members of their own generation.

It therefore seems quite possible for a future generation's equal protection challenge to bypass Parfit's identity problem. This need not involve thinking of a future generation as having a fixed identity of its own, apart from the individuals making it up. Members of future generations may assert that a prior generation's policy choices denied them the equal protection of the laws relative to those persons who would have taken roughly their places had more enlightened policies been adopted. Less counterfactually, members of future generations may also assert a denial of equal protection with respect precisely to the members of the prior generation who benefited themselves by adopting the challenged policies. Members of the later generation may be said to have been afforded less of some crucial resource than their predecessor generation allocated to itself. It of course remains true that if those policies had not been adopted, the challenging parties themselves would, on Parfit's assumptions, never have existed in the first place, so they are presumably not "worse off" because of the adoption of the policies in question. The equal protection challenge, however, may focus on the availability of fewer resources, or the presence of greater obstacles, for the actual members of later, as opposed to earlier, generations, where such disparities are traceable to the policy choices of the earlier generation.

C. Equal Protection as a Relatively Stringent Moral Standard

Classically, liberal political theory has explicitly provided only quite limited safeguards for the interests of future generations.[164] In some respects, this is not surprising or disturbing, in that Hobbes, Locke, Hume, and Rousseau were not confronted with the possibility of radioactive waste remaining toxic for thousands of years.[165] The opportunity, if not the temptation, to despoil the future has always been available, however.[166] It is even less justifiable for contemporary theorists who recognize moral rights held by or for the benefit of future generations to adopt enforceable moral standards less stringent than the interpretation of equal protection flowing from what we have referred to as the progressive Burkean partnership.[167]

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164. *See* Barry, *supra* note 17, at 283.

165. *Cf.* Warren, *supra* note 150, at 141 (discussing such contemporary environmental issues).

166. *See* J. BUCHANAN, *supra* note 48, at 189.

167. *See supra* section II.

Often, it will be unclear from a particular statement whether a writer is endorsing an overall principle of intergenerational obligation weaker than the progressive Burkean interpretation of equal protection, or is instead merely referring to one relatively undemanding element or minimal implication of a stronger principle. Not all moral declarations take the form of a general theory. Statements endorsing a principle, for example, of providing for the basic needs[168] of future generations may be ambiguous as to whether our making such a provision would entirely discharge our moral obligation in this regard to future generations. A similar ambiguity may attach to statements to the effect that we are obligated to leave future generations at least as well off[169] in some respect as we are, or that we should avoid imposing or failing to reasonably prevent future disasters and threats to the interests of future generations.[170] The crucial point, for our purposes, is that such formulations by themselves, as well as more explicitly minimalist theories of intergenerational justice such as that of Robert Nozick[171] tend, under typical historical circumstances, to fail to promote the interests of future generations as well as the constitutional guarantee of equal protection to future generations afforded by the progressive, successively sacrificial interpretation of the Burkean partnership discussed above.[172]

Even reasonably stringent equal protection, however, does not imply the moral arbitrariness of all societal policies burdening the future. Given appropriate assumptions, it may be rational and fair to shift certain costs or risks into the future. If we are faced with an inescapable choice, for example, between the use of a toxic waste disposal container that will rupture in fifty years, and an equally costly container that will rupture in five hundred years, our ordinary assumptions lead us systematically toward the latter choice. There may be more people around to be affected in five hundred years. But the probability of there being no one around to be adversely affected in five hundred years is presumably at least slightly greater than for fifty years hence.[173] Similarly, there is presumably at least a slightly greater chance that people five hundred years from now, as opposed to fifty, will not view a toxic waste container rupture as a

168. *See, e.g.*, J. STERBA, *supra* note 153, at 139; Derr, *supra* note 3, at 43.

169. *See, e.g.*, Barry, *supra* note 17, at 284; Kavka, *supra* note 16, at 202; Warren *supra* note 150, at 139-40.

170. *See, e.g.*, J. GLOVER, *supra* note 47, at 150; Baier, *supra* note 58, at 241.

171. *See generally* R. Nozick, *supra* note 161; Elliot, *supra* note 161.

172. *See supra* section II.

173. *See* Govier, *What Should We Do About Future People?*, 16 AM. PHIL. Q. 105, 109 (1979) (harm to future people measured by attitude toward harm to existing people).

significant threat to their well-being, for various possible reasons.[174] Medical science may well advance in relevant respects in the period between fifty and five hundred years from now.[175]

These uncertainties illustrate that the most sensible approach to the equal protection should, extreme cases aside, focus not on the availability in the future of particular resources, or the absence of particular risks, but on the overall level of resources and risks, and the sufficiency of the resources that will be available to cope with the risks. It will not matter crucially, within limits, if we deplete some particular resource, if we also develop a fully adequate substitute,[176] or even that we impose the risk of a new disease, if we also bequeath an inexpensive vaccine. Generally, equal protection of the future should focus at a minimum on assuring adequate and increased levels of overall wealth or resources to overcome or mitigate such threats as may arise. It is for this reason that low savings rates and imposed burdens of indebtedness are central to the problem of the equal protection of future generations, and why litigation on behalf of the future should focus centrally on federal fiscal policy. Sufficient overall wealth in the future may fund the solutions to particular risks of various sorts.

Focusing on overall wealth, however, should not lead us morally astray. In our society, aggregate or per capita wealth has generally tended to increase over time. This contingent fact may have led some writers to adopt a broader, noncontingent principle known as the social discount rate. Advocates of such a principle have not entirely agreed among themselves as to how the principle itself should be expressed.[177] The general idea seems to be roughly that it is rational and fair to gradually reduce the moral importance we attach to events as those events occur further in the future. On its own terms, such a view is morally controversial at best.[178] For our purposes, it is important to bear in mind that the reasonableness of applying a social discount rate to future events depends entirely on the validity of the crucial assumptions underlying the use of such a

174. *See* J. GLOVER, *supra* note 47, at 149; Baier, *supra* note 58, at 227; Golding, *supra* note 6, at 97-98; Passmore, *supra* note 13, at 51. We may set aside the option of using most of the next five hundred years slowly to brainwash people into being delighted by the possibility of being exposed to toxic waste. *See* Glover, *How Should We Decide What Sort of World Is Best?*, in ETHICS AND PROBLEMS OF THE 21ST CENTURY 79, 87 (1979). We may also set aside as an unnecessary complication the idea of establishing now a compounding fund to provide compensation for remote victims of our actions.

175. For a sense of the limitations of this argument, *see* Barry, *supra* note 17, at 275.

176. *See* D. PARFIT, *supra* note 158, at 365.

177. *See* Baier, *supra* note 58, at 238.

178. *See* Williams, *Discounting Versus Maximum Sustainable Yield*, in OBLIGATIONS, *supra* note 2, at 169.

rate. If we assume that future generations will, because of return on investment and invention, in fact be richer than our generation, or more able to cope with a particular problem, or that the problem may dissolve in the interim, these assumptions may lead occasionally to fairly imposing some risks or costs on the future rather than the present. But there is no independently grounded reason for concluding that a particular degree of human pain in the year 2020 in and of itself matters somewhat less than the same degree of pain today.[179]

Even when the social discount rate literature is interpreted to take future pain as seriously as present pain, the sense of equality pervading much of that literature remains static and unhistorical. As a matter of American cultural tradition, we have not been content with providing a mix of resources and risks such that each succeeding generation is merely just as well off as its predecessor. While this tradition is perhaps now attenuated, we have traditionally held, partly from a sense of moral responsibility, that each generation should start from a higher baseline level of well-being and resources than its predecessors, whether this required substantial sacrifices by the prior generation or not. In either its positive or normative moments, the social discount rate literature shows little recognition of the historic importance of this cultural tradition of successive generational sacrifice.[180]

There is a final respect in which equal protection of future generations can be seen as a relatively stringent moral standard. This is simply that there is no reason to believe that anything like the progressive Burkean partnership is hardwired into our very natures.

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179. *See* D. PARFIT, *supra* note 158, at 480-86; Nielsen, *The Enforcement of Morality and Future Generations*, 3 PHILOSOPHIA 443, 445-46 (1973). For general discussion of the idea of a social discount rate, and of the optimal such rate, see G. BRENNAN & J. BUCHANAN, *supra* note 48, at 83-84 (noting the problem of actually implementing a theoretically optimal social discount rate); Baumol, *On the Social Rate of Discount*, 58 AM. ECON. REV. 788, 801 (1968) (concluding that apart from certain externalities and public goods problems, "the future can be left to take care of itself"); Marglin, *The Social Rate of Discount and the Optimal Rate of Investment*, 77 Q.J. ECON. 95, 98 (1963) (discussing a "democratic" rationale for not overruling a fully informed citizenry's possible indifference to the welfare of future generations); Mishan, *Economic Criteria for Intergenerational Comparisons*, 9 FUTURES 383, 397 (1977) (equal distribution of natural resources and capital endowment among all generations as a just distribution); Mueller, *Intergenerational Justice and the Social Discount Rate*, 5 THEORY & DECISION 263, 267 (1974) (same); Sen, *On Optimising the Rate of Saving*, 71 ECON. J. 479, 495 (1961) (noting possibility of rational discrepancy between individual and collective preferences for optimal savings rates); Tullock, *The Social Rate of Discount and the Optimal Rate of Investment: Comment*, 78 Q.J. ECON. 331, 334 (1964) (increasing consumption of persons "already" consuming more than ourselves has little attraction).

180. See the discussions referred to parenthetically *supra* note 179.

There is no reason to assume that patterns of social, environmental, and economic redistribution victimizing future generations are prohibited by our genetic programming.

The young and controversial science of sociobiology[181] emphasizes the role of assistance by older to younger relatives[182] and broader patterns of reciprocal altruism[183] in the process of each set of genes' "striving" to reproduce itself over time.[184] Even if we assume the descriptive usefulness of the less extreme claims of sociobiological theory, however, that theory gives us no grounds for complacency. We can grievously shortchange future generations through collective public policy without disadvantaging particular genes or substantially impairing the likelihood of any set of genes' proliferating in the next generation or so.

Even where intergenerational redistribution would make the survival of particular genes somewhat less likely, biology imposes no insuperable barrier to this sort of redistribution. Even the most ardent sociobiologists recognize the existence of forms of altruism and of "personal," as opposed to genetic, selfishness not explainable through sociobiological theory.[185] Human behavior, even toward our individual and collective descendants, is plainly influenced by culture,[186] as contemporary divorce law, environmental law, and federal budgetary policy make clear.[187] As Professor John Beckstrom has duly recognized, "[n]o one doubts that we can neglect our relatives and bestow benefits on strangers if we concentrate on doing so."[188]

Thus, even if we assume the least implausible claims of sociobiological theory to be true and useful, we still have no grounds for concluding that substantial intergenerational redistribution at the expense of posterity must be only a short-lived phenomenon, or that such a pattern of redistribution, however temporary, cannot

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181. For a relatively thorough, technical treatment of sociobiology, see E. WILSON, SOCIOBIOLOGY: THE NEW SYNTHESIS (1975).

182. *See* R. DAWKINS, THE SELFISH GENE 103 (1976).

183. *See id.* at 197-202; Trivers, *The Evolution of Reciprocal Altruism*, 46 Q. REV. BIOLOGY 35 (1971).

184. *See* R. DAWKINS, *supra* note 182, at IX; Beckstrom, *Behavioral Research on Aid-Giving That Can Assist Lawmakers While Testing Scientific Theory*, 1 J. CONTEMP. HEALTH L. & POL'Y 25, 28 (1985) ("most of our behavior is, consciously or unconsciously, to a greater or lesser degree directed towards reproducing our genes").

185. *See* Beckstrom, *The Potential Dangers and Benefits of Introducing Sociobiology to Lawyers*, 79 NW. U.L. REV. 1279, 1280 (1985).

186. *See* Maleski, *Sociobiology and the California Public Trust Doctrine: The New Synthesis Applied*, 25 NAT. RESOURCES J. 429, 439 (1985).

187. *See supra* text at section III.

188. Beckstrom, *supra* note 185, at 1280.

rise to a level of constitutional significance, deserving of judicial attention.

V. Conclusion: Equal Protection of Future Generations as a Legally Resolvable Issue

As a matter of disembodied logic, it is possible to agree with each proposition enunciated above, and yet conclude that no judicial redress based on the equal protection clause should ever be available, because of inherent, unavoidable problems associated with matters such as standing, ripeness, and the political question doctrine. It is also possible to reply that the underlying intergenerational problem is not of the nature or severity indicated, or that ordinary electoral mechanisms can somehow be expected to provide redress. However, the severity and intractability of the problem justifies any reasonable modifications of the ordinary rules of justiciability, developed for use in other contexts, necessary to redress a massive breach in our historical social contract. If one sees the problem as one of great practical importance and as otherwise not likely to be resolved, one will ask whether observance of familiar strict rules of justiciability is worth the immense price required. One will be tempted to view a mechanical insistence on restrictive doctrines of justiciability, at the price of massive injustice to the politically unenfranchised, as a mere rationalization reflecting the same self-indulgence as led to the underlying problem of intergenerational injustice in the first place. The choice, however, between practical redress and jurisprudential purity is really not so stark. There is a plausible case for the justiciability of equal protection claims on behalf of future generations based on existing doctrines and trends in the case law.

The inability of future generations to themselves literally appear and seek injunctive or declaratory relief at the most propitious time is more, rather than less, reason to take their interests seriously through recognizing legal guardians to make obvious legal claims on their behalf.[189] The courts have occasionally been willing to recognize legally enforceable duties owed not merely to those not yet born, but to those not yet even conceived,[190] at least as long as the

189. *See* Sartorius, *supra* note 150, at 201.

190. *See, e.g.*, Turpin v. Sortini, 31 Cal. 3d 220, 233-34, 643 P.2d 954, 962, 182 Cal. Rptr. 337, 345 (1982) (en banc) (negligent failure to diagnose hereditary problem preconception as giving rise to legal cause of action in later-conceived child); Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 480, 656 P.2d 483, 495 (1983) (en banc) (holding that "a duty may extend to persons not yet conceived at the time of a negligent act or omission" as limited by foreseeability); *see also* Bayles, *supra* note 160, at 294-95; Tucker,

injury is, as in our context, reasonably foreseeable. Standing to seek at least injunctive relief should similarly be recognized in our context.

The United States Supreme Court has recognized that "standing is not to be denied simply because many people suffer the same injury . . . ."[191] While the Court has also declined to recognize standing where the challenged harm "amounts only to a generalized grievance shared by a large number of citizens in a substantially equal measure,"[192] this is, even if applicable in our contexts, merely a prudential, rather than a constitutionally required, restriction on standing.[193] More fundamentally, substantial wealth redistribution from future to present voters is not simply a random outcome of the political process, but a predictable result of the non-enfranchisement of a group in some cases largely coextensive with the victims of such redistribution.

It is also possible to deny that a case involving the equal protection of future generations can ever, by its very nature, be judicially "ripe" for resolution. The United States Supreme Court, however, has found sufficient ripeness, admittedly in light of certain immediately threatened effects,[194] in a case in which waiting for possible future consequences, in the form of an actual nuclear accident, would have added immeasurably to the concreteness and certainty associated with the crucial substantive issue in the case, the limitation of utility company damages liability.[195] Quite sensibly, the Court in ripeness contexts considers not only the fitness or suitability of the issues for resolution by the court,[196] but the degree of hardship to the parties, including the plaintiff, of delaying or withholding judicial resolution.[197] In our context, delaying court challenge until the future generation arrives to feel the injury does not

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Wrongful Life: A New Generation, 27 J. FAM. L. 673, 687 (1989) (briefly discussing relevant case law). *But cf.* Wincamp Partnership v. Anne Arundel County, 458 F. Supp. 1009, 1025 (D. Md. 1978) (plaintiff land developers lack standing to raise right to travel of third parties either of present or of future generations).

191. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 687 (1973).

192. Duke Power Co. v. Carolina Env'tal. Study Group, Inc., 438 U.S. 59, 80 (1978). *See* C. WRIGHT, THE LAW OF FEDERAL COURTS ch. 2, § 13, at 71 (4th ed. 1983).

193. *See Duke Power Co.*, 438 U.S. at 80.

194. *See id.* at 73.

195. *See id.* at 81-82.

196. *See* Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967).

197. *See Duke Power Co.*, 438 U.S. at 82 (consideration of adverse effects on parties of deferring judicial resolution); Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 164 (1967) (noting the relevance, in dicta, of irremediable adverse consequences); *Abbott Laboratories*, 387 U.S. at 149 (consideration of "hardship to the parties of withholding court consideration").

simply avoid abstract or premature litigation, but inescapably dictates that no legal remedy whatsoever may ever be had. Considerations essentially similar to those involved in the issues of standing and ripeness arise in the political question doctrine.[198]

In general, the question of the justiciability of equal protection challenges to the "time bomb" effects of matters such as federal budgetary policy presents yet another forum for the perpetual struggle between formalism and realism in constitutional adjudication.[199] In this context, however, the eventual triumph of jurisprudential realism must come at the cost of some sacrifice by current generations.

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198. *See* Baker v. Carr, 369 U.S. 186, 217 (1962) (granting the plaintiffs standing to sue for relief under equal protection clause). Most of the considerations normally suggesting nonjusticiability on political question grounds are essentially inapplicable in our context. *See id.* It is of course possible to argue that there is a "lack of judicially discoverable and manageable standards" for resolving the equal protection claims of future generations based on, for example, current federal budgetary policy. *Id.* This argument, though, again amounts to a litmus test for one's degree of sympathy for the plaintiff's claims on the merits. There are a number of variant approaches to the problem of equal protection in our context, but we can lend precision and predictability to the judicial resolution of these cases simply by settling on some particular approach. Admittedly, a great degree of speculation and imprecision in fashioning any injunctive or declaratory relief will be inevitable. As we have come to appreciate in ordinary tort and contract contexts, though, where the effects of the injury may be manifold and long-term, a remedy that embodies our best guesses about future events may well be fairer than denying any remedy at all, which preposterously assumes that probable future effects are best thought of as non-existent. *See, e.g.*, Pipkin v. Thomas & Hill, Inc., 298 N.C. 278, 288-89, 258 S.E.2d 778, 785 (1979).

It should be remembered, finally, that we are applying the equal protection clause, a constitutional provision with an immense body of explanatory case law in a wide variety of broad social contexts, where a given case frequently affects millions of citizens. In this regard, our approach is less speculative and less path-breaking than, for example, the popular call for a new Constitutional amendment purporting to require a balanced federal budget. For discussion of some of the justiciability issues involved in that context, see Stith, *Federal Spending and the Deficit*, 11 GEO. MASON U.L. REV. 119 (1988); Stubblebine, *Fiscal Balance and the Federal Constitution*, 11 GEO. MASON U.L. REV. 125 (1988); Thornburgh, *Gramm-Rudman-Hollings and the Balanced Budget Amendment: A Page of History*, 25 HARV. J. LEGIS. 611 (1988); Note, *Article III Problems in Enforcing the Balanced Budget Amendment*, 83 COLUM. L. REV. 1065 (1983).

199. *Compare, e.g.*, Hammer v. Dagenhart, 247 U.S. 251 (1918) (allowing otherwise insoluble broad social problems to remain unredressed out of excessive doctrinal fastidiousness) *with* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (finally breaking with such fastidiousness).